Annotatie bij EHRM 6 mei 2003 (Appleby and Others v. the United Kingdom) (Onmogelijkheid van demo in winkelcentrum)

Brouwer, J.G.; Schilder, A.E.

Europees Hof
6 mei 2003
(Pellonpää, Bratza, Palm, Stráznická, Pavlovschi, Garlicki en Maruste)
Nr. 44306/98
(m.nt. J.G. Brouwer en A.E. Schilder)

EVRM art. 10, 11

Meningsuiting, vergadering, positieve verplichtingen, voor het publiek openstaande gebouwen en daarbij behorende erven

Samenvatting
Appleby e.a. wensen in 1998 in de Galleries, een winkelcomplex, tevens nieuw stadshart van het Engelse plaatsje Washington, actie te voeren tegen de plannen tot bebouwing van het Princess Anne Park, de enige speelplaats in het stadje. Het verzoek aan de eigenaar (Postel Properties Limited) om in het winkelcomplex of op het parkeerterrein een standje te mogen plaatsen en folders uit te delen, wordt echter afgewezen. De redengeving is dat bij exploitatie van het complex een beleid wordt gevoerd van strikte neutraliteit ten aanzien van alle politieke en religieuze onderwerpen. Daarmee verdraagt het uitdelen van folders en het verzamelen van handtekeningen zich niet.
Appellanten beklagen zich in Straatsburg, omdat zij vinden dat de staat verantwoordelijk kan worden gehouden voor de schending van hun vrijheid van meningsuiting en vergadering (openbare manifestaties). Bij de eigendomsoverdracht van het complex aan Postel zou de overheid verzuimd hebben een zogeheten walkways agreement in de zin van art. 35 Highways Act 1980 te sluiten op grond waarvan aan de voetpaden de bestemming openbaar zou toekomen en de overheid de bevoegdheid zou hebben bij verordening het gebruik ervan te reguleren.
Volgens het Hof kan echter niet worden gezegd dat de staat tekort is geschoten bij de naleving van zijn positieve verplichtingen om de uitoefening van art. 10 en 11 EVRM te verzekeren. De beperkingen van de vrijheid van meningsuiting en het recht op vergadering zijn hiervoor niet schrijnend genoeg.

JUDGMENT STRASBOURG 6 May 2003

FINAL

24/09/2003

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Appleby and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. Pellonpää, *President*,

Sir Nicolas Bratza,

Mrs E. Palm,

Mrs V. Stráznická,

Mr R. Maruste,

Mr S. Pavlovschi,

Mr L. Garlicki, *judges*,

and Mr M. O'Boyle, *Section Registrar*,

Having deliberated in private on 8 April 2003,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44306/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three United Kingdom nationals, Mrs Eileen Appleby, Mrs Pamela Beresford and Mr Robert Alphonsus, and an environmental group, Washington First Forum, ("the applicants"), on 1 September 1998.

2. The applicants, who had been granted legal aid, were represented by Mr J. Welch, a lawyer working for Liberty in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley.

3. The applicants alleged that they had been prevented from meeting in the town centre, a privately owned shopping centre, to impart information and ideas about proposed local development plans. They invoke Articles 10, 11 and 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 October 2002 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr C. Whomersley, *Agent*,

Mr J. Crow, *Counsel*,

Mrs J.-A. Mackenzie, *Adviser;*

(b) *for the applicants*

Mr Rabinder Singh, Q.C., *Counsel*,

Mr A. Sharland, *Counsel*,

Ms J. Sawyer, *Adviser*.

The applicants Mrs E. Appleby and Mrs P. Beresford were also present.

The Court heard addresses by Mr Crow and Mr Rabinder Singh.

8. By a decision of 12 November 2002, following a hearing on admissibility and the merits (Rule 54 § 4),] the Court declared the application admissible.

9. The applicants made submissions on just satisfaction to which the Government replied.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington in Tyne and Wear, where the fourth applicant, an environmental group set up by the applicants, is also based.

11. The new town centre of Washington is known as the Galleries and is located within an area now owned by Postel Properties Limited ("Postel"), a private company. This town centre was originally built by the Washington Development Corporation ("the Corporation"), a body set up by the government of the United Kingdom pursuant to an Act of Parliament to build the "new" centre. The centre was sold to Postel on 30 December 1987.

12. The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in this vicinity. However, the freehold of the careers' office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on

behalf of Northumbria Police Authority. There was a post office and the offices of the housing department, leased to the Council by Postel, within the Galleries.

13. In about September 1997, the Council gave outline planning permission to the City of Sunderland College ("the College") to build on part of the Princess Anne Park in Washington, known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the College's proposal and to persuade the Council not to grant the College permission to build on the field.

14. On or about 14 March 1998, the first applicant, together with her husband and son, set up two stands in the entrance of the shopping mall in the Galleries, displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not allow the first applicant or her assistants to continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15. The manager of the one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and collect signatures, albeit from a reduced number of persons. However this permission was not granted in April 1998 when the applicants wished to collect signatures for a further petition.

16. On 10 April 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries to ask for permission to set up a stall and to canvass views from the public either in the mall or in the adjacent car parks and offered to make a payment to be able to do so. On 14 April 1998 the manager of the Galleries replied and refused access. The letter stated:

"... the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.

The owner's stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.

I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks."

17. On 19 April 1998, the third applicant wrote again to the manager of the Galleries asking him to reconsider his decision. The applicants have received no response to this letter.

18. The fourth applicant has continued to seek access to the public by setting up stalls by the side of the road on public footpaths and visiting the old town centre at Concord, which however is visited by a much smaller percentage of the residents of Washington.

19. The deadline for letters of representation to the Council regarding the building works was 1 May 1998. The applicants submitted the 3,200 letters of representation they had obtained on 30 April 1998.

20. The applicant has provided a list of organisations which have been allowed to carry out collections, set up stalls and displays within the Galleries, including the

Salvation Army (collection before Christmas), local school choirs (carol-singing and collection before Christmas), Stop Smoking Campaign (advertising display handing out nicotine patches), Blood Transfusion Service (blood collection), Royal British Legion (collection for Armistice Day), various photographers (advertising and taking photographs) and British Gas (staffed advertising display).

21. From 31 January to 6 March 2001, Sunderland Council ran a consultation campaign "Your Council, Your Choice" informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise under section 25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of "executive arrangements" and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as responding to the survey issued.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This covers commercial premises, such as shops, theatres and restaurants as well as private premises (e.g. there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person's ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23. In the case of *CIN Properties Ltd v. Rawlins* [1995] 2 EGLR 130), where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the Centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of section 18(1) of the Highways Act 1971 (later replaced by section 35 of the Highways Act 1980) which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue bye-laws regulating use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case-law from North America concerning the applicants' arguments for the finding of some kind of public right:

"Of more obvious relevance are two North American cases. In *Uston v. Resorts International Inc.* (1982) N.J. 445A.2D 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises – in that case a gaming casino – to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in State v. Schmid (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.

The case of *Harrison v. Carswell* (1975) 62 D.L.R. (3d.) 68 in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter

under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and:–

'If it was necessary to categorize the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.'

I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by section 18 of the Highways Act 1971 and section 35 of the Highways Act 1980. (*Harrison v. Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.

I would allow this appeal... on the basis that CIN, had the right, subject only to the issue under section 20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre."

III. CASES FROM OTHER JURISDICTIONS

24. The parties have referred to case-law from the United States and Canada.

United States

25. The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26. The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as "public fora" for the exercise of free speech rights (*Hague v. Committee for Industrial Organisation*, 307 US 496 (1939). In *Marsh v. Alabama* (326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946)), the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately-owned properties, such as shopping centres, on the basis that there has to be "State action" (a degree of State involvement) for the amendment to apply (for example, *Hudgens v. NLRB*, 424 US 507 (1976)).

27. The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its premises of leaflets unrelated to its own operations (*Lloyd Corp. v. Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972)). This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene

any other federal constitutional provisions (*Pruneyard Shopping Center v. Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980)).

28. Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures (for example, *Batchelder v. Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp. v. Whiffen*, 849 P.2d 446, 453-54 (Or. 1993), *Southcenter Joint Venture v. National Democratic Policy Comm*., 780 P.2d 1282 (Wash. 1989). Some cases found State obligations arising due to State involvement, for example, *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991) (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown v. Beneda*, 477 N.W. 2d (N.D. 1991) (where the shopping centre was owned by a public body, though leased to a private developer).

29. Other cases cited as indicating a right to reasonable access to property under State private law were *State v. Shack*, 277 1.2d 369 (N.J. 1971) where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v. Resorts International* 445 A.2d 370 (N.J. 1982), a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately-owned property, p.374); *Streetwatch v. National Railroad Passenger Corp.*, 875 F. Supp. 1055 (S.D.N.Y. 1995) concerning the ejection of homeless people from a railway station.

30. State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona (*Fiesta Mall Venture v. Mecham Recall Comm.* 767 P.2d 719 (Ariz. Ct. App. 1989)); Connecticut (*Cologne v. Westfarms Assocs* 469 1.2d 1201 (Conn. 1984)); Georgia (*Citizens for Ethical Gov't v. Gwinnet Place Assoc.* 392 S.E.2d 8 (Ga. 1990)); Michigan (*Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985)); Minnesota (*State of Minnesota v. Wicklund et al*, April 7, 1998 (Minnesota Court of Appeals)); North Carolina (*State of North Carolina v. Felmet*, 273 S.E.2d 708 (N.C. 1981); Ohio (Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994)); Pennsylvania (*Western Pa Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 1.2d 1331 (Pa 1986)); South Carolina (*Charleston Joint Venture v. McPherson*, 417 S.E.2d 544 (SC 1992)); Washington (*South Center Joint Venture v. National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989); Wisconsin (*Jacobs v. Major*, 407 N.W.2d 832 (Wis. 1987)).

Canada

31. Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters (*Harrison v. Carswell* 62 D.L.R. (3d) 68). After the Charter entered into force, a lower court held that the right to free speech applied in privately

owned shopping centres (*R. v. Layton*, 38 CCC(3d) 550 (1986)(Provincial Court, Judicial District of York, Ontario). However an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression (McLachlin J, *Committee for Cth of Can. v. Canada* [1991] 1 SCR 139 at p. 128).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. Article 10 of the Convention provides as relevant:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The parties' submissions

1. The applicants

33. The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity that built the Galleries on public land and a minister who approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement which would have extended bye-law protection to access ways but did not do so.

34. The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to advocate a political proposal regarding the re-organisation of local government. The applicants however had been refused permission to use the Galleries for expression opposing local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas. They considered that no proper balance has been struck as protection was given to property owners who wielded an absolute discretion as to access to their land and no regard was given to individuals seeking to exercise their individual rights.

35. The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of

application could be resolved by carefully drafted legislation. A definition of "quasi-public" land could be proposed that excluded, for example, theatres. They also referred to case-law from other jurisdictions (in particular the United States) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

2. The Government

36. The Government submitted that at the relevant time the town centre was owned by a private company Postel and that it was Postel, in the exercise of its rights as property owner, which refused the applicants' permission to use the Galleries for their activities. They argued that the Government in those circumstances could not be regarded as bearing direct responsibility for any interference with the applicants' exercise of their rights. The fact that the local authority had previously owned the land was irrelevant.

37. Insofar as the applicants claimed that the State's positive obligation to secure their rights is engaged, the Government acknowledged that positive obligations were capable of arising under Articles 10 and 11. However, such obligations did not arise in the present case having regard to a number of factors. The alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures on their petition as a result. The burden imposed on the State by finding a positive obligation would also be a heavy one. Local authorities when selling land were not under any duty to enter into walkways agreements to render access areas subject to regulation by bye-law. The State's ability to comply by entering into such agreements when selling State owned land would depend entirely on obtaining the co-operation of the private sector purchaser who might reasonably not want to allow any form of canvassing on his land and might feel that customers to commercial services would be deterred by political canvassers, religious activists, animal rights campaigners etc.

38. Furthermore a fair balance had been struck between the competing interests in this case. The applicants in their view only looked at one side of the balancing exercise, whereas legitimate objections could be taken by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means to exercise those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or appear on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill-defined concept of "quasi-public" land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the United States and Canada referred to by the applicants were not relevant as they dealt with different legal provisions and different factual situations, and in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land.

B. The Court's assessment

1. General principles

39. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (see *Özgür Gündem v. Turkey* ((Sect. 4) no. 23144/93, ECHR 2000-III, judgment of 16 March 2000, §§ 42-46, where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also *Fuentes Bobo v. Spain*, (Sect. 4), no. 39293/98, judgment of 29 February 2000, § 38, concerning the obligation on the State to protect freedom of expression in the employment context).

40. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, *Rees v. the United Kingdom,* judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and *Osman v. the United Kingdom,* judgment cited above, pp. 3159-60, § 116).

2. Application in the present case

41. In this case, the applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company, which owned the shopping centre. The Court does not find that the Government bear any direct responsibility for this restriction in the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the Government have failed in any positive obligation to protect the exercise of the applicants' Article 10 rights from interference by others, in this case, the owner of the Galleries.

42. The nature of the Convention right at stake is an important consideration.

43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally-elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Article 1 of Protocol No. 1.

44. The Court has noted the applicants' arguments and the references in the United States cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45. The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

46. The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately-owned property open to the public, the U.S. Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Article 10 of the Convention.

47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly-owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example (see *Marsh v. Alabama*, cited at paragraph 26 above).

48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door-to-door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods

were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign (see paragraph 21). The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49. Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression.

50. Consequently, there has been no violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

51. Article 11 of the Convention provides as relevant:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others ...

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

52. The Court finds largely identical considerations arise under this provision as examined above under Article 10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and accordingly, no violation of Article 11 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

53. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

54. The applicants submitted that they have no remedy for the complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case-law of the English courts indicated that the owner of a shopping centre can give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private body.

55. The Government accepted that, if contrary to their arguments, the State's positive obligations were engaged and that there was an unjustified interference under Articles 10 or 11, there was no remedy available to the applicants under domestic law.

56. The case-law of the Convention institutions indicates, however, that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 48, § 86). Insofar therefore as no remedy existed in domestic law prior to 2 October 2000 when the Human Rights Act 1998 took effect, the applicants' complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57. The Court finds in the circumstances no breach of Article 13 of the Convention in the present case.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 10 of the Convention;

2. *Holds* by six votes to one that there has been no violation of Article 11 of the Convention;

3. *Holds* unanimously that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 6 May 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle Matti Pellonpää

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Maruste is annexed to this judgment.

M.P.

M.O.B.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Articles 10 and 11 were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

The case raises the important issue of the State's positive obligations in a modern liberal State where many traditionally state-owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the right balance between private and public interests?

The new town centre was planned and built originally by a body set up by the government (see paragraph 11). At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature several important public services like the public library, the social services office, the health centre and even the police station were also located in or adjacent to the centre. Through specific actions and decisions the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

There is no doubt that the area in its functional nature and essence is a *forum publicum* or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber (see paragraph 44). The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups including local government (see paragraphs 20 and 34) who had used the place for similar purposes without restrictions.

The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local government powers; in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.

In these circumstances it is hard to agree with the Chamber's finding that the Government bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the

property of a privately-owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round – property rights prevailed over freedom of speech.

Of course, it would clearly be too far-reaching to say that no limitations can be put on the exercise of rights and freedoms on private grounds or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately-owned *forum publicum* was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Articles 10 and 11.

Annotatie:

1. Appleby e.a. wensen in 1998 actie te voeren in een particulier winkelcomplex in het Engelse stadje Washington, tegen de plannen tot bebouwing van de enige speelplaats in het stadje, het Princess Anne Park. Zij richten een verzoek aan de eigenaar (Postel Properties Limited) van de Galleries om in zijn winkelcentrum een standje te mogen plaatsen en folders uit te delen. Dat wordt echter afgewezen met als redengeving dat het complex particulier bezit is en dat de opstelling ten aanzien van alle politieke en religieuze onderwerpen er één is van strikte neutraliteit, waarmee het uitdelen van folders en het verzamelen van handtekeningen zich niet verdraagt.
2. Daarop spannen Appleby c.s. een procedure aan tegen de Engelse staat. Volgens hen kan de overheid verantwoordelijk worden gehouden voor de schending van hun vrijheid van meningsuiting en vergadering. Hun redenering hiervoor is als volgt. Een door de regering opgericht consortium heeft het complex met behulp van publieke gelden krachtens een Act of Parliament op overheidsgrond laten bouwen. De eigendomsoverdracht van het complex aan Postel is goedgekeurd door de verantwoordelijke minister. Bij deze overdracht is verzuimd een zogeheten walkways agreement te sluiten in de zin van art. 35 Highways Act 1980. Op grond hiervan zouden de voetpaden openbaar terrein zijn en zou de overheid de bevoegdheid hebben om bij verordening het gebruik ervan te reguleren.
Volgens klagers is de handelswijze van de overheid in strijd met haar rechtsplicht zoals die voortvloeit uit art. 10 en art. 11 EVRM, omdat het winkelcomplex het hart van het stadje vormt en de meest effectieve plek voor communicatie met het publiek is. Bovendien zijn er niet alleen particuliere winkelbedrijven gevestigd, maar ook openbare diensten, zoals de openbare bibliotheek, de sociale dienst, een gezondheidscentrum van de overheid en zelfs een politiebureau. In een dergelijke quasi-openbare ruimte dient de overheid de uitoefening van de vrijheid van meningsuiting en het recht om te demonstreren te verzekeren.
3. De partijen in deze zaak verwijzen onder meer naar Amerikaanse jurisprudentie over toegang in ruime zin tot particuliere winkelcentra. Uit een reeks van uitspraken - winkelcentra zijn in de VS een veel langer bestaand verschijnsel dan in Europa - blijkt dat particuliere eigenaren nauwelijks verplichtingen hebben in de sfeer van het garanderen van een vrije meningsuiting en het recht op vreedzame manifestaties,

zoals vastgelegd in het eerste Amendement op de Amerikaanse Grondwet.
State courts proberen nog wel eens aan statelijke constitutionele bepalingen reflexwerking toe te kennen, zodanig dat hieruit voor eigenaren van winkelcentra een plicht voortvloeit om de uitoefening van het recht op vrije meningsuiting of een recht op het verzamelen van handtekeningen te garanderen. Dat rechtsgevolg werd bijvoorbeeld verbonden aan een bepaling van de staat Massachusetts die personen het recht geeft wetgeving te initiëren als ze over een minimaal aantal handtekeningen beschikken (Batchelder tegen Allied Stories Int' N., 1983).
Het Supreme Court is echter nooit zo ver gegaan. Een particuliere eigenaar heeft volgens de hoogste rechter in de VS weliswaar niet het recht om mensen op onredelijke grond van toegang uit te sluiten - hij heeft de plicht om bezoekende personen niet willekeurig, noch discriminatoir te behandelen (SC 1982, Uston tegen Resorts International Inc.) -, maar de Amerikaanse Grondwet staat er niet aan in de weg dat een particuliere eigenaar van een winkelcentrum het uitdelen van folders op zijn grondgebied verbiedt (SC 1971, Lloyd tegen Tanner).
4. Hoe anders is de positie van de demonstranten in winkelcentra onder het Nederlandse recht. We kunnen twee rechtsregimes onderscheiden. In praktisch alle gevallen gaat het in het geval van winkelcentra om voor het publiek openstaande gebouwen en daarbij behorende erven. Dat zijn plaatsen die voor een onbeperkt aantal personen toegankelijk zijn, maar niet als openbaar zijn bestemd (zie bijv. de memorie van toelichting bij wetsvoorstel uitbreiding strafbaarstelling heimelijk cameratoezicht, *Kamerstukken II* 2000/01, 27732, nr. 3). Andere voorbeelden hiervan zijn winkels, horecagelegenheden als ook voetbalstadions.
Wat betreft de publiekrechtelijke situatie geldt dat een zodanig winkelcentrum, althans de gemeenschappelijke ruimten zoals de wegen en paden daarin, een openbare plaats is in de zin van art. 1 Wet op de openbare manifestaties (Wom). Dat betekent dat een kennisgeving van een demonstratieve actie volgens de plaatselijke verordening ex art. 4 Wom aan de gemeente is vereist. Op grond van art. 5 Wom kan de burgemeester voorschriften en beperkingen stellen of een verbod geven.
Het privaatrechtelijke rechtsregime is als volgt. Art. 5:22 BW bepaalt dat wanneer een erf niet is afgesloten (voor het publiek openstaand), een ieder zich daar vrijelijk mag begeven, tenzij de eigenaar schade of hinder hiervan ondervindt. Uit deze regel vloeit voort dat zolang er geen schade of hinder wordt veroorzaakt, aan de eigenaar van een winkelcentrum geen toestemming hoeft te worden gevraagd om op de gemeenschappelijke wegen/paden een demonstratieve actie te voeren.
Een tweede mogelijkheid is dat een particulier winkelcentrum, althans de gemeenschappelijke voetpaden, de bestemming openbaar hebben in de zin van art. 4 Wegenwet. Dit is maar zelden het geval, de oost-west verbinding in Hoog Catharijne is hier een voorbeeld van. Demonstranten moeten ook nu de burgemeester vooraf in kennis stellen van hun beoogde betoging. Die zal de demonstratie op de voorgenomen plaats kunnen verbieden, indien de in art. 5 Wom beschermde belangen in het gedrang komen, waaronder het verkeersbelang. Daartoe lijkt geen ruimte als de winkels bijvoorbeeld bereikbaar blijven, dan wel dat er slechts ongemakken zijn van korte duur.
Naast een publiekrechtelijk, verticaal kader is er ook hier weer een privaatrechtelijke, horizontale context (HR 17 januari 1941, *NJ* 1941, 644 (Parlevinkers) (m.nt. PS), *AB Klassiek* 2003, nr. 7 (m.nt HH) en ARRvS 23 december 1988, AB 1990, 178 (m.nt. JHvdV). Het publiek kan van de voetpaden gebruik maken voorzover dat tot het "gewone gebruik" behoort (zie voor dit onderscheid: G.A. van der Veen, *Van openbare zaken*, Zwolle, 1997), want voor dat gebruik wordt de eigenaar geacht zijn

eigendom als openbaar te hebben bestemd. Wat onder "gewoon gebruik" valt, hangt af van de inrichting en het vaste gebruik van de ruimte. Vervult het winkelcentrum bijvoorbeeld tevens een functie van centrale ontmoetingsplaats, dan zal een demonstratieve actie van bescheiden omvang tot het "gewone gebruik" gerekend kunnen worden en is er geen toestemming nodig van de eigenaar.
Moet een demonstratieve actie worden gekarakteriseerd als vallende onder "bijzonder gebruik" - het opzetten van een standje wordt in de Nederlandse jurisprudentie bijna altijd als zodanig gebruik getypeerd - dan is toestemming van de eigenaar vereist (H.Ph.J.A.M. Hennekens, *Openbare zaken naar publiek- en het privaatrecht*, Zwolle, 1993). Die kan een dergelijke bijeenkomst verbieden op grond van zijn eigendomsrecht. Als de eigenaar zijn recht echter in de strijd gooit om bijvoorbeeld te differentiëren naar inhoud van een bijeenkomst (linkse acties worden niet toegelaten), dan kunnen grondrechtelijke waarden ingeroepen worden ter beperking van de privaatrechtelijke pretentie van de eigenaar. De art. 3:13 en 3:14 BW kunnen hierbij dienstig zijn.
We zien derhalve dat onder het Nederlandse recht het rechtsregime van een winkelcentrum dat openbaar is in weinig verschilt van de regels die winkelcentra beheersen die voor het publiek openstaan. Van verschil is alleen sprake als een erf - in de termen van art. 5:22 BW - gesloten is: geen openbare bestemming dan wel niet voor het publiek openstaand. De Engelsen bezigen voor deze situatie de uitdrukking my home is my castle. Het wil zeggen dat het huisrecht aan de orde is en dat een eigenaar, ongeacht wie die eigenaar is, burger dan wel overheid, in beginsel niets van anderen zonder zijn toestemming hoeft te tolereren. Is de rechtspersoon gemeente eigenaar van een terrein dat gesloten is, dan hoeft de burgemeester als vertegenwoordiger van de rechtspersoon de uitoefening van het recht tot betoging op zodanig terrein niet te dulden. Weliswaar gelden de grondrechten tegen de overheid ook in privaatrechtelijke betrekkingen, maar regels die noodzakelijk zijn voor de verwezenlijking van de functie van het erf of de gebouwen erop mag de burgemeester handhaven.
5. Volgens Engels recht verschilt het rechtsregime van een openbaar erf wel van dat van een voor publiek opstaand erf, althans dat is de impliciete aanname van het Hof. Alleen indien de bestemming van het winkelcentrum een openbare is, zou de plaatselijke verordening die de toelaatbaarheid van demonstratieve acties reguleert er van toepassing zijn. Is dat niet het geval dan zou het winkelcentrum uitsluitend vallen onder een privaatrechtelijk rechtsregime volgens welk de eigenaar geen enkele verplichting heeft om een demonstratie te dulden. Blijkbaar hanteert men in Engeland een formeel juridisch criterium voor openbare plaatsen, daar waar men in ons rechtsstelsel uitgaat van de feitelijke openbaarheid.
6. Het verplicht het Hof uitgebreid in te gaan op de rechtsvraag of er op de overheid een plicht rust om bij vervreemding van een winkelcomplex aan een particulier garanties af te dwingen voor de uitoefening van grondrechten in dat winkelcentrum. In het onderhavige geval kan die eis volgens het Hof niet worden gesteld, gelet op het feit dat op andere plaatsen in de stad nog voldoende mogelijkheden zijn om meningen te openbaren en acties te organiseren. Bij de beantwoording van de vraag naar de mogelijke inspanningsverplichting van de overheid stelt het Hof voorop dat de garantie van vrijheid van meningsuiting één van de basisvoorwaarden is voor een goed functionerende democratie. Een effectieve uitoefening van dit grondrecht is niet alleen afhankelijk van de plicht van de overheid om zich te onthouden van bemoeienis in dit domein, maar kan onder omstandigheden ook positieve inspanningen met zich meebrengen - zelfs in de betrekkingen tussen particulieren.

7. Het bestaan van positieve verplichten voor lidstaten werd voor het eerst aanvaard in 1981 in de zaak Marckx tegen België. In latere uitspraken werkte het Hof dit leerstuk verder uit (zie hierover: Mowbray, A.R., "The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights"; *Human rights law in perspective*, 2004). In de zaak Özgür Gründem tegen Turkije (EHRM 2000-III, nr. 23144/93) nam het Hof bijvoorbeeld aan dat er op de Turkse overheid de plicht rustte om maatregelen te treffen in de sfeer van onderzoek en bescherming toen een pro-PKK krant en zijn journalisten slachtoffer dreigden te worden van een campagne van geweld en intimidatie. In een andere zaak (EHRM 2000-III, nr. 39293/98 Fuentes Bobo tegen Spanje) nam het Hof aan dat de staat de plicht heeft om de vrijheid van meningsuiting te beschermen in de sfeer van het werk. Of er een positieve verplichting op de staat rust, hangt - zoals steeds in de Conventie - af van het gewicht van het algemeen belang in verhouding tot het belang van het individu. Sinds de zaak Abdulaziz en Rees beantwoordt het Hof deze vraag veelal met behulp van de "fair balance"- test (R.A. Lawson, "Positieve verplichtingen onder het EVRM, Opkomst en ondergang van de "Fair Balance"-test", *NJCM-Bulletin*, 1995, 558-574 en 727-750). Volgens het Hof is het een afweging die niet in algemene regels valt te vangen, want steeds moet rekening worden gehouden met de concrete omstandigheden in een land en de keuzes die gemaakt moeten worden in termen van prioriteiten en beschikbare middelen. Ook mag de verplichting voor een staat nooit zodanig zijn dat zij een onmogelijke of disproportionele last voor de overheid inhoudt (zie bijv. Rees tegen Verenigd Koninkrijk, 1986, *Series A*, nr. 106).
8. In verband met de vraag of het Verenigd Koninkrijk daadwerkelijk tekort geschoten is in het beschermen van klagers overweegt het Hof dat de vrijheid van meningsuiting een belangrijk, maar geen onbeperkt recht is. Noch is het hier het enige recht dat speelt. Het eigendomsrecht van art. 1 Eerste Protocol zou bij het aannemen van een positieve verplichting in het gedrang kunnen komen. Voorts stelt het Hof dat de Galleries weliswaar een veel bredere functie vervullen dan alleen van winkelcentrum, want het vertoont karaktertrekken die overeenkomen met een traditioneel stadscentrum. Dat is echter in de visie van het Hof onvoldoende om een plicht aan te nemen voor de overheid om de uitoefening van eigendomsrechten te reguleren. Dat zou anders liggen als er bijvoorbeeld sprake was van een corporate town. In die situatie besliste ook het Amerikaanse Supreme Court dat een particuliere beleggingsmaatschappij de vrijheid van meningsuiting en vreedzame manifestaties moet garanderen, vanwege de bijzondere omstandigheid dat zij eigenaresse was van een stadje dat alle eigenschappen bezat van een reguliere stad (SC 1946, Marsh tegen Alabama).
Onder de zich in het stadje Washington voordoende omstandigheden kan volgens het Hof niet worden gezegd dat de staat tekort is geschoten bij de naleving van zijn positieve verplichtingen om de uitoefening van art. 10 en 11 EVRM te verzekeren. De beperkingen van de vrijheid van meningsuiting alsmede van het recht op vergadering zijn hiervoor niet schrijnend genoeg. De mogelijkheden van de actievoerders waren lang niet uitgeput. Zij hadden bijvoorbeeld aan de winkeliers in het complex toestemming kunnen vragen om in hun ruimten pamfletten uit te delen. Ook bleef de mogelijkheid bestaan om in het oude stadscentrum campagne te voeren, langs huizen te gaan en gebruik te maken van lokale media. Mede uit het feit dat er toch nog 3200 handtekeningen werden verzameld, leidt het Hof af dat Postel de uitoefening van de vrijheden niet werkelijk heeft belemmerd.
9. Rechter Maruste is het niet eens met dit meerderheidsstandpunt van het Hof. Volgens deze dissenter mag het niet zo zijn dat een overheid door simpelweg te

privatiseren zich aan elke vorm van verantwoordelijkheid kan onttrekken in verband met het beschermen van rechten en vrijheden. Hij vindt dat de overheid bij het creëren van een forum als de Galleries zeker had moeten stellen dat de uitoefening van individuele rechten en vrijheden binnen de grenzen van het redelijke wordt gerespecteerd. Het is volgens hem redelijk om naarmate de sociale gemeenschapsfunctie van een winkelcentrum meer op de voorgrond komt te staan - en niet alleen de commerciële exploitatie ervan - te eisen dat er ook meer ruimte moet zijn voor aspecten van het openbare leven die samenhangen met culturele uitingen en politieke manifestaties.

10. Wij delen zijn standpunt in zoverre dat de (lokale) overheid bij de geplande ruimtelijke inrichting van een stad er op toe moet zien dat voor een gemeenschapsfunctie zoals de uitoefening van grondrechten ruimte van enige betekenis overblijft (vgl. de jurisprudentie van de Hoge Raad en de Afdeling bestuursrechtspraak met betrekking tot art. 7 Gw). Soms zal het hiervoor noodzakelijk zijn privaatrechtelijke afspraken bij de overdracht van grond te maken. Ook kan het zinvol zijn (andere) bestuurlijke instrumenten in te zetten: convenant, financiële prikkels of meer dwingende voorschriften in een bestemmingsplan. Op welke wijze de ruimte van enige betekenis wordt gerealiseerd is minder relevant, als maar voorkomen wordt dat grondrechten achter de horizon verdwijnen wanneer projectontwikkelaars in beeld verschijnen.